Supreme Court, U.S.
FILED
961782 MAR 31 1997
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

Petitioners,

v.

CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, LILY BENTAS, BYRON HASEOTES, GEORGE HASEOTES, ROBERT LANGFORD, JOHN DROLETTE, JAMES MUMMA, APRIL GREEN, PETER PANTAZELOS, WENDY OLSEN, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN AND HARRIET ANTHONY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes a state appellate court from dismissing claims against nondebtor officers and employees of a debtor corporation, for the sole reason that the claimants filed proofs of claim in the bankruptcy court which had forever barred and discharged all claims against the nondebtor officers and employees of the debtor corporation.

2. Whether the Due Process Clause and the Anti-Injunction Act preclude a Massachusetts state court from dismissing claims of plaintiffs for the reason that a federal district court in New Jersey has enjoined them from prosecuting their claims on the grounds that they were members of a mandatory non-opt out class, where they had exercised their right to exclude themselves from a Rule 23(b)(3) class action.

3. Whether the Due Process Clause precludes a Massachusetts appellate court from depriving a plaintiff, who was ordered to pay defendants $34,661.56 for filing a frivolous complaint, of her right to appeal the judgment dismissing the complaint, where the trial court ordered that the plaintiff could recover the $34,661.56 if she prevailed on appeal and a Massachusetts statute provides the right to appeal.

4. Whether the Equal Protection Clause of the Fourteenth Amendment precludes a Massachusetts appellate court from dismissing the appeal of a superior court judgment for the sole reason that a bankruptcy court has barred claims against nondebtor defendants in the lawsuit, where the debtor is not a defendant and where a Massachusetts statute provides that parties aggrieved by a decision of a superior court have the right to appeal.

LIST OF PARTIES

Petitioners Cheryl Adams, Richard Waugh, Brent Adams, Ronald Ring, Patricia Adams, Robert Ravitz, Carrie Burke, Weldon Adams, Elizabeth Targee, Tina Levesque and Melissa Smith Rapa respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in this proceeding on January 23, 1997.

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No.

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CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

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CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, LILY BENTAS, BYRON HASEOTES, GEORGE HASEOTES, ROBERT LANGFORD, JOHN DROLETTE, JAMES MUMMA, APRIL GREEN, PETER PANTAZELOS, WENDY OLSEN, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN AND HARRIET ANTHONY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Suffolk County Superior Court dismissed the petitioners' claims in *Cheryl Adams* v. *Cumberland Farms, Inc., et al.*, No. 91-231 (Essex) and in *Richard Waugh, et al.* v. *Demetrios Haseotes, et al.*, No. 93-2663, on July 11, 1995 without issuing an

opinion. On July 17, 1995, it ordered judgment for the defendants, dismissing Petitioner Cheryl Adams' claims in *Cheryl Adams* v. *Kevin Burke, et al.*, No. 94-0627, and ordered her to pay the defendants $34,661.56 in attorney's fees and costs in an unreported opinion. (A. A). The Supreme Judicial Court of the Commonwealth of Massachusetts dismissed the petitioners' appeals in *Cheryl Adams, et al.* v. *Cumberland Farms, Inc., et al.*, No. SJC-07294, on January 23, 1997 without issuing an opinion.

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on January 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> *** nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title 28 United States Code § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

3. Massachusetts General Laws, c. 231, § 113 provides in pertinent part:

> A party aggrieved by a final judgment of the superior court *** may appeal therefrom *** .

STATEMENT OF THE CASE

Procedure: #203-5, TERMINATION OF EMPLOYEES, promulgated in 1972 and never rescinded, spelled out the Cumberland Farms policy of making up for inventory losses by having Cumberland Farms, Inc. ("CFI") loss prevention specialists plan with area supervisors to obtain confessions from employees. It required CFI supervisors to terminate managers who could not control inventories unless the manager could show that the inventory was affected by a subordinate who confessed to dishonesty.

The Director of the CFI Loss Prevention Department directed the interrogation of approximately 40,000 employees and the production of confessions from more than 20,000. His 1985 Memorandum Re: Productivity, Standards and Job Requirements — never rescinded — required each loss prevention specialist to produce an absolute minimum of 30 interrogations per month. He made it clear that interrogations are the primary responsibility and that CFI does not have the luxury of investigation.

A CFI agent, without evidence of her wrongdoing and without reason to suspect her, interrogated Cheryl Adams for four hours and twenty minutes on February 8, 1989. He talked about loss prevention, about stealing. He said CFI has done a long investigation of you. Then he said he knew of her divorce, that she had a son and there was a possible custody battle. He said this won't help your case.

Then he said he was there to help her; that if she cooperated, everything would get cleared up right now or it could be done at

the police station. He said it's our word against yours and we always win. He went over her *Miranda* rights. He told her she had the right to leave, but if she did it would be turned over to the police; that she faced jail and would lose custody of her son.

Everything would be all right, he said, if she wrote out a statement. He dictated every word of a four-page confession to stealing $11,895. The confession was almost word-for-word identical to a 1969 form confession and to over 20,000 confessions dictated by CFI agents to CFI employees.

CFI records show that Adams was the 37,139th employee interrogated. Approximately 25 confessions a week were obtained from CFI employees until June of 1990, when reports of the existence of the scheme were disseminated in the media.

On April 27, 1989, Cheryl Adams pleaded guilty to larceny over $250 from CFI. The Ipswich District Court sentenced her to five years probation, contingent on her paying restitution to CFI of $5500. It allowed her motion for a new trial on December 27, 1990.

In January of 1991 Adams filed *Adams* v. *Cumberland Farms, Inc.*, Essex County Superior Court, No. 91-231. The crux of her complaint was that the defendant officers and employees of CFI carried out a scheme by which low-level employees were wrongfully accused of stealing and coerced into signing confessions through threats, including that of being arrested. The defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S, based on her federal RICO Act claim.

On January 24, 1992, a jury found Adams not guilty of the sole charge against her, larceny over $250.

Adams moved to amend her lawsuit into a class action in March of 1992 and to add as plaintiffs ten other former CFI employees, petitioners in this case. A hearing on the motion to

amend was scheduled for Monday, May 4, 1992. On Friday, May 1, 1992, CFI filed a chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, *In re CFI*, No. 92-41305-JFQ. As a result, proceedings were stayed in *Adams* v. *CFI*. The petitioners, 11 putative plaintiffs in *Adams* v. *CFI*, filed a class proof of claim in the bankruptcy case.

The district court vacated the automatic stay as to the non-debtor defendants on June 17, 1992 (A. B), and remanded the case to the superior court on July 29, 1992.

The petitioners filed a class action lawsuit in May of 1993 in Suffolk County Superior Court, *Richard Waugh, et al.* v. *Demetrios Haseotes, et al.*, No. 93-2663, alleging they were wrongfully accused of stealing by these defendants and suffered harm as a result. They did not name CFI as a defendant.

On December 24, 1986, former CFI employees filed a class action lawsuit in the United States District Court for the District of New Jersey, *Curley* v. *CFI*, No. 86-5057. On June 22, 1993, the *Curley* parties reached a preliminary settlement. Terms of the settlement included: 1) a class would be certified for settlement purposes consisting of former CFI employees who were the subject of questioning or attempted questioning from October 15, 1970, the date the RICO Act went into effect, until May 1, 1992; and 2) the parties would seek approval from the bankruptcy court for a mandatory non-opt out class consisting of all individuals who filed proofs of claim related to CFI's loss prevention practices.

On July 10, 1993, the petitioners moved to intervene in the *Curley* case as plaintiffs. The *Curley* court denied the motion for the reason that the class was a Rule 23(b)(3) class and the petitioners could opt out of the class (A. C). They opted out of the class in valid and timely fashion on August 27, 1993.

On August 30, 1993, the bankruptcy court approved a joint motion by the debtor, CFI, and the *Curley* plaintiffs for a

mandatory non-opt out class of former CFI employees who filed proofs of claim in *In re CFI*. The order stated: "Approval is not given on the merits. The court merely approves the procedure under which approval is determined by the district judge." (A. D). The petitioners filed a notice of appeal.

The *Curley* court issued a Final Order and Judgment approving the class settlement on September 8, 1993. The order stated: "1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class." (A. E). On July 18, 1994, the *Curley* Court authorized payment to the class from the settlement fund.

On August 17, 1993, the superior court ordered the *Adams* v. *CFI* case consolidated with the *Waugh* v. *Haseotes* case. The court ordered proceedings stayed in the two consolidated cases on December 31, 1993 pending a decision on the appeal of the August 30, 1993 bankruptcy court order.

Adams filed *Cheryl Adams* v. *Kevin Burke, et al.*, Suffolk County Superior Court, No. 94-0627, on February 7, 1994. She alleged that the defendants conspired with prosecutors and attorneys to violate her civil rights. She provided evidence, uncontroverted by the defendants, of justice being obstructed to find her guilty of stealing $11,895 from CFI, a crime the defendants knew she did not commit. Adams presented evidence of the defendants fabricating a $60 cash audit, of mutilating documents, of suborning perjury about "Precious" diapers, and of hiding material witnesses April Green and Wendy Olsen.

The respondents filed a motion on July 5, 1995 to dismiss the petitioners' claims in *Adams* v. *CFI* and *Waugh* v. *Haseotes*, based on the petitioners being members of the *Curley* settlement class. The superior court allowed the motion and entered judgment for the respondents on July 11, 1995 without issuing an opinion.

The superior court entered judgment for the respondents in *Adams* v. *Burke* on July 17, 1995. (A. A). It ordered Cheryl Adams to pay the respondents $34,661.56 in attorney's fees and costs for the reason that she knew she was enjoined by the *Curley* Court from prosecuting her claims and that her claims were wholly insubstantial, frivolous and not advanced in good faith.

The United States District Court for the District of Massachusetts affirmed the order of the bankruptcy court on June 7, 1995 in *Cheryl Adams, et al.* v. *CFI*, No. 93-40187. The First Circuit affirmed that order in No. 95-1736 on May 6, 1996. On November 4, 1996, this Court denied the petition for a writ of certiorari, No. 96-300.

On November 14, 1996, the respondents moved for dismissal of the petitioners' appeals in the Supreme Judicial Court of the Commonwealth of Massachusetts in *Cheryl Adams, et al.* v. *Cumberland Farms, Inc., et al.*, No. SJC-07294, on the grounds that further appeal had been rendered moot by this Court's denial of the petition for certiorari. The Supreme Judicial Court dismissed the petitioners' appeals on January 23, 1997 without issuing an opinion.

REASONS FOR GRANTING THE WRIT

I. DEPRIVING THE PETITIONERS OF THEIR DAY IN COURT TO PROSECUTE THEIR CLAIMS AGAINST NON-DEBTOR DEFENDANTS, FOR THE SOLE REASON THAT THEY EXERCISED THEIR RIGHT TO FILE A PROOF OF CLAIM IN A BANKRUPTCY COURT, VIOLATES THE DUE PROCESS CLAUSE.

This Court has asserted that our deep-rooted historic tradition mandates that everyone should have his own day in court. *Martin* v. *Wilkes*, 490 U.S. 755, 762 (1989). Even though the

defendants have not denied a single fact alleged by the plaintiffs, the plaintiffs have yet to have their day in court.

The Massachusetts Supreme Judicial Court deprived the plaintiffs of their day in court when it allowed the defendants' motion to dismiss based solely on the bankruptcy court's order mandating that the plaintiffs be members of a non-opt out class in the *Curley* case. In this case the plaintiffs' claims were against these non-debtor defendants, not against the debtor, CFI. The outcome of the plaintiffs' claims against the non-debtors could not conceivably have any effect on the estate of the debtor, CFI. The proceedings against the non-debtor defendants are thus not related to the bankruptcy. *Celotex Corp.* v. *Edwards*, 115 S.Ct. 1493, 1499 (1995). In addition, the U.S. District Court for the District of Massachusetts vacated the automatic stay as to the non-debtor defendants, allowing these plaintiffs to prosecute their claims. Thus, the judgment of the Supreme Judicial Court, based on the bankruptcy court order, erred in stripping the plaintiffs of an opportunity to be heard, violating their right of due process. *Little* v. *Streator*, 452 U.S. 1, 3 (1981).

The New Jersey district court denied the petitioners' motion to intervene in the *Curley* v. *CFI* class action lawsuit as plaintiffs for the reason that they could exclude themselves from the class. They excluded themselves in valid and timely fashion. They were never parties in the *Curley* case. They are therefore not bound by the Final Order and Judgment in the *Curley* case. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974).

The settlement, agreed to by the *Curley* parties and approved by the *Curley* Court and by the bankruptcy court in which CFI filed its chapter 11 petition, cannot dispose of the valid claims of these petitioners. *Local Number 93* v. *City of Cleveland*, 478 U.S. 501, 529 (1986).

Procedural due process requires that these plaintiffs, deprived of their rights to clear their names and to recover dam-

ages for the harm inflicted on them by the defendants, be afforded appellate review. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20 (1991).

II. THE *CURLEY* COURT COULD NOT ENJOIN THE PETITIONERS FROM PROSECUTING THEIR CLAIMS IN A MASSACHUSETTS STATE COURT, WHERE THEY WERE NEVER PARTIES IN THE *CURLEY* CASE AND THEY OPTED OUT OF THE *CURLEY* RULE 23(b)(3) CLASS ACTION AS THE *CURLEY* COURT DETERMINED THEY COULD.

The U.S. District Court for the District of New Jersey lacked jurisdiction over the person of these plaintiffs, who were never parties in the *Curley* case. *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). It lacked subject matter jurisdiction over them where they opted out of the Rule 23(b)(3) class action. The Massachusetts Supreme Judicial Court therefore violated the due process rights of the plaintiffs when it ascribed to the *Curley* Court the binding force and validity of its orders and judgments. *Ins. Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 (1982).

The Anti-Injunction Act, 28 U.S.C. § 2283, precluded the *Curley* Court from enjoining proceedings in the Massachusetts state courts where no act of Congress authorized an exception, and there is no need, having had its final order affirmed and having issued its distribution order, to enjoin proceedings to aid its jurisdiction or to protect its judgment. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988). A federal district court lacks jurisdiction over a state-law claim in a state court when jurisdiction is not essential to the conduct of federal-court business. *Kokkonen* v. *Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1677 (1994).

III. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DEPRIVED CHERYL ADAMS OF HER RIGHT TO APPEAL THE JUDGMENT ORDERING HER TO PAY THE DEFENDANTS $34,661.56, THEREBY DEPRIVING HER OF THAT PROPERTY WITHOUT GRANTING HER THE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Denying review of the judgment requiring Cheryl Adams to pay the defendants $34,661.56 and interest violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Honda Motor Co., Ltd.* v. *Oberg*, 114 S.Ct. 2331, 2340 (1994). The purpose of the Due Process Clause is to prevent such arbitrary deprivations of liberty or property. *Id.* at 2342. Adams' liberty and property interests should not be forfeited until there has been a fair trial in a public tribunal. *In re Oliver*, 333 U.S. 257, 278 (1948). Procedural due process requires judicial review of punitive damage awards. *TXO Production Corp.* v. *Alliance Resources*, 113 S.Ct. 2711, 2727 (1993).

IV. THE EQUAL PROTECTION CLAUSE PRECLUDES A MASSACHUSETTS APPELLATE COURT FROM DEPRIVING PERSONS WHO FILE PROOFS OF CLAIM IN A BANKRUPTCY COURT FROM APPEALING ADVERSE JUDGMENTS WHERE A MASSACHUSETTS STATUTE GRANTS THAT RIGHT TO ALL OTHER PERSONS.

Section 113 of chapter 231 of the Massachusetts General Laws affords these plaintiffs the right to appeal the judgment of the superior court dismissing their claims. Where section 113 provides such a right, it cannot be granted to some and arbitrarily denied to these plaintiffs for the reason that they filed a proof of claim in a bankruptcy court without violating the Equal Protection Clause. *Lindsey* v. *Normet*, 405 U.S. 56, 57

(1972). Appellate courts must apply the rules governing appellate review in a way that provides a fair opportunity to obtain an adjudication on the merits of an appeal. *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985).

The language of section 113 creates a presumption that the plaintiffs can appeal from the superior court judgment, and thus a liberty interest is created which is protected by the Due Process Clause as well as by the Equal Protection Clause. *Board of Pardons* v. *Allen*, 482 U.S. 369, 381 (1987). This Court has determined that the Fourteenth Amendment provides the protection of a guarantee of fair procedure. *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990).

CONCLUSION.

For these reasons, a writ of *certiorari* should issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 94-0627-B

CHERYL ADAMS,
Plaintiff

vs.

CUMBERLAND FARMS, INC. & others,
Defendants

FINDINGS ASSESSING ATTORNEYS' FEES
and ORDER FOR JUDGMENT

Pursuant to this court's order, dated June 8, 1995, on defendants' motion to dismiss and for attorney's fees, a hearing was held on July 11, 1995. The purpose of the hearing was: (1) to determine the reasonableness of the attorney's fees and costs requested by defense counsel; and (2) to afford plaintiff, Cheryl Adams, an opportunity to testify in opposition to the motion to assess fees and costs against her pursuant to G.L. c. 231, § 6F. Ms. Adams did not appear at the hearing. Her attorney, Stanley Cohen, advised the court that he had discussed the court's decision with her and that she chose not to appear in court because of a scheduled camping trip. Attorney Cohen advised the court that it was Ms. Adams' wish that he continue to represent her in this matter. Also, Attorney Cohen advised the court that while neither he nor Ms. Adams contested the reasonableness of the fees and costs requested by the defend-

ants, they insist that no fees or costs should be awarded because this action is meritorious and was brought in good faith. After considering the arguments of counsel, the court now makes the following findings and rulings.

The claims asserted by Ms. Adams in this case "were wholly insubstantial, frivolous and not advanced in good faith." She brought this action knowing that she had been enjoined by the U.S. District Court for the District of New Jersey from prosecuting this action. She also knew the claims against the defendants other than Cumberland Farms, Inc. were frivolous. Under these circumstances, Ms. Adams is also liable for reasonable attorneys' fees and costs pursuant to G.L. c. 231, § 6F.

Counsel seeks an award of attorneys' fees in the amount of $32,081 and costs of $2,580.56. The court has reviewed the record in this case, including the affidavits in support of the requested award of attorneys' fees. Although the assessment of a reasonable award of attorneys' fees is largely discretionary, some of the factors that should be taken into consideration are "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by attorneys in the area, and the amount of awards in similar cases." *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979), citing *Darmetko* v. *Boston Housing Authority*, 378 Mass. 758, 763-764 (1979). After considering these relevant factors, the court finds the requested award of attorneys' fees to be extremely reasonable. The court also finds that the costs incurred are reasonable. Therefore, the court hereby finds that a reasonable award of attorneys' fees in this case is $32,081.00 and that a reasonable award of costs is $2,580.56.

Accordingly, the court orders the entry of the following judgment:

Judgment for Cumberland Farms, Inc., Lilly Bentas, James Mumma, John Drolette, Robert Langford, Marge Olsen, Wendy Olsen, Timothy O'Brien, Philip Moss, Moss, McGill & Bachelder, P.A., Robert Smith, Nicholas McClear and Wilentz, Goldman & Spitzer, P.C. against Cheryl Adams and Attorney Stanley R. Cohen, jointly and severally, for attorneys' fees of $32,081.00 plus costs of $2,580.56[1]

/s/_____
Patrick J. King
Justice of the Superior Court

DATED: July 12, 1995

[1] At the July 11, 1995 hearing, Attorney Moss advised the court that Attorney Cohen had filed yet a sixth lawsuit in Federal Court raising the same claims as are raised in the instant action. Pursuant to the request of Attorney Moss, a copy of the court's decision in this case will be forwarded to the Board of Bar Overseers of the Commonwealth of Massachusetts.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL ADAMS, et al
Plaintiffs

v.

CIVIL ACTION
NO. 91-10627-S

CUMBERLAND FARMS, INC., et al
Defendants

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND VACATION OF STAY

June 17, 1992

SKINNER, D.J.

The plaintiffs seek preliminary injunction to prevent the transfer of the assets of the individual defendants (the corporate defendant having filed for bankruptcy). The plaintiffs have not submitted evidence comparable to that which would be required for an attachment or which would satisfy the requirement of a showing of immediate, irreparable harm necessary for the issuance of a preliminary injunction. Furthermore, the ambiguity of the evidence casts doubt on whether the plaintiffs are likely to succeed on the merits. Accordingly, the motion for preliminary injunction is *denied*.

The stay heretofore entered is *vacated* with respect to the individual defendants.

/s/_____
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LANCE CURLEY, et al.,
Plaintiffs,

Civil Action
No. 86-5057 (SSB)

v.

CUMBERLAND FARMS, INC., et al.,
Defendants.

CHERYL ADAMS, RONALD RING, RICHARD WAUGH, BRENT ADAMS, CARRIE BURKE, PATRICIA ADAMS, ELIZABETH TARGEE, MELISSA SMITH RAPA, ROBERT RAVITZ, NANCY FRENCH, WELDON ADAMS, TINA LEVESQUE, WILLIAM CONNORS, AND MATTHEW VAN WINKLE,
Applicants for
Intervention

This matter having come before the court on the motion of Cheryl Adams, *et al.*, to intervene as plaintiffs, for leave to allow plaintiff subclasses, to order that appropriate notice be provided putative class members and to order the ascertainment of the defendants' net worth;

The court having considered the submissions of the parties;

The court finding that the proposed settlement this court preliminarily approved in its order of July 28, 1993 provides ample opportunity for Adams, *et al.* to "opt-out" of the proposed class in this matter; *see* July 28, 1993 Order ¶ 9; *see also* Fed. R. Civ. P. 23(b)(3), 23(c)(2); and

The court further finding that the proposed settlement this court preliminarily approved in its order of July 28, 1993 provides ample opportunity for Adams, *et al.*, to raise any objections they may have to the terms and procedure of the settlement; *see* July 28, 1993 Order ¶¶ 6-7; and

The court further finding that there is no evidence that plaintiffs' counsel in this matter have failed to fulfill their duty to class members, including Adams, *et al.*, or have colluded in any way with counsel for the defendants; *cf.* Transcript of June 22, 1993 Hearing at 23 (court notes the "extraordinarily hard work on both sides for reaching . . . a fair compromise under all of the circumstances" and describes the case as "a long, long battle"); and

It appearing that intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2)[1] is unavailable where, as in this case, a proposed class settlement neither impairs nor impedes the applicants' ability to protect their interests, in that the applicants have the opportunity to exclude themselves from the settlement, *see Woolen* v. *Surtran Taxicabs, Inc.*, 684 F.2d 324, 334 (5th Cir. 1982); *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354, 357 (2d Cir. 1979), or to oppose the settlement through objections, *see id.*, and where the interests of the class are being adequately represented, *see Woodland Private Study Group* v. *State of New Jersey*, 616 F.Supp. 794, 799 (D.N.J. 1985), *vacated on other grounds*, 846 F.2d 921 (3d Cir. 1988);

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[1] Rule 24(a)(2) provides in relevant part:

> Upon timely application anyone shall be permitted to intervent in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

IT IS on this 11th day of August 1993 hereby

ORDERED that the motion of Cheryl Adams, *et al.*, is DENIED.

No costs.

/s/_____

Stanley S. Brotman
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:

CUMBERLAND FARMS, INC.,

DEBTOR.

CHAPTER 11

CASE NO.
92-41305-JFQ

ORDER AUTHORIZING AND APPROVING JOINT MOTION FOR APPROVAL OF A NON-OPT SETTLEMENT CLASS AND FOR APPROVAL OF CLASS SETTLEMENT OF LOSS PREVENTION CLAIMS

AFTER DUE NOTICE of and hearing on the Joint Motion ("Joint Motion") by Debtor and the Curley Plaintiffs, as defined in the Joint Motion, For Approval of a Non-opt Out Settlement Class and For Approval of a Class Settlement of Loss Prevention Claims and due cause appearing to me therefore, it is hereby

FOUND that notice of the Joint Motion was sufficient and proper; and it is further

FOUND that the relief requested is in the best interest of the Debtor's estate and its Creditors,

NOW THEREFORE is is hereby

ORDERED that the Joint Motion is granted and approved in all respects * contingent upon the final approval of the settlement in the case styled *Lance Curley, et al.* v. *Cumberland*

* Approval is not given on the merits. The court merely approves the procedure under which approval is determined by the district judge.

Farms, Inc., et al. ("Curley Case"), currently pending in the United States District Court for the District of New Jersey, Civil Action No. 86-5057(SSB) on the terms and conditions set forth in Exhibit A to the Joint Motion or on terms and conditions substantially similar thereto; and it is further

ORDERED that the Debtor may execute whatever documents are necessary to evidence the settlement and carry out the terms of this Order; and it is further

ORDERED that upon final approval of the settlement in the Curley Case, any claim brought by or which could have been brought by any of the individuals who filed LPD Bankruptcy Claims, as defined in the Joint Motion, against the Debtor, its affiliates and/or their predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), their past or present owners, officers, directors, employees, agents, including without limitation attorneys retained to represent or who have represented the Debtor and/or its employees in the loss prevention matters, insurers and/or named insureds based upon, arising out of or in any way related to the individual's employment, including termination of employment with Cumberland, shall be forever barred and discharged; and it is further

ORDERED that in the event that the settlement in the Curley Case is not approved by final order, including all appeals thereto, or if the settlement is terminated by the defendants in the Curley Case pursuant to the terms of the settlement, this Order shall be null and void without further force and effect.

Signed this 30th day of August, 1993 at Worcester.

/s/_____

The Honorable James F. Queenan, Jr.
Chief United States Bankruptcy Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LANCE CURLEY, et al.,
Plaintiffs,

vs.

Civil Action No.
86-5057 (SSB)

CUMBERLAND FARMS, INC.,
Defendants.

FINAL ORDER AND JUDGMENT

On July 28, 1993, this Court preliminarily approved the Proposed Settlement and entered an Order conditionally certifying, for settlement purposes only, a class composed of:

> All persons employed at any convenience store or gasoline station owned or operated by Cumberland Farms, Inc. who were, at any time from October 15, 1970 through May 1, 1992, the subject of questioning or attempted questioning by field agents of Cumberland Farms Loss Prevention Department (formerly known as the Security Department) and who suffered injury as a result (the "Class");

By that Order, this Court also scheduled a hearing to be held on September 8, 1993, at 9:30 A.M. in Courtroom 2 of the United States Courthouse, 401 Market Street, Camden, New Jersey: (i) to determine whether the Proposed Settlement is fair, reasonable and adequate and in the best interests of the Class; (ii) to

determine whether final judgment should be entered thereon dismissing all claims and causes of action between the Class and the defendants on the merits, with prejudice, and without costs; (iii) to consider the applications of plaintiffs' counsel for awards of attorneys' fees, costs and disbursements; and (iv) any other matters the Court may deem appropriate.

On September 8, 1993, a hearing was held in accordance with the terms of this Court's July 28, 1993, Order, at which time all interested persons were afforded the opportunity to be heard. This Court has considered all of the submissions and arguments presented with respect to the Proposed Settlement and upon consideration thereof, this Court FINDS, CONCLUDES, ADJUDGES and DECREES as follows:

1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This Order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class and do not withdraw their requests for exclusion by the time the Court authorizes payment to the Class from the Settlement Fund.

2. The Court hereby confirms its Order dated July 28, 1993 and certifies this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

3. The Proposed Settlement, as embodies by the transcript of Settlement made before the Honorable Magistrate Judge Rosen on June 22, 1993 is fair, reasonable and adequate, is in the best interest of the Class and is approved.

4. The notification provided for and given to the Class is the best notice practicable under the circumstances and is in full compliance with the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure.

5. This Court hereby enters Final Judgment in this action dismissing all claims and causes of actions between the Class and the defendants, on the merits, with prejudice and without

costs, in accordance with the terms of the Settlement. All claims which were asserted or which could have been asserted in the *Curley* litigation by plaintiffs and/or any Class member against Cumberland Farms, its affiliates and/or its predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), or any of its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insurers (the "Released Parties"), arising out of or in any way related to the Class Members' employment, including termination at Cumberland, will be extinguished forever.

6. All plaintiffs, and members of the Class, whether or not they have filed lawsuits, their heirs, executors, administrators, successors, and/or assigns are forever barred and enjoined from instituting or prosecuting either directly or indirectly any action against the Released Parties arising out of or in any related to the Class member's employment, including termination at Cumberland.

7. The Released Parties release any claim, action, cause of action, or demand of whatever kind against the Class members.

8. Without affecting the finality of this Judgment, this Court hereby reserves and retains continuing jurisdiction to order performance of the Settlement, including, but not limited to, the award of attorneys' fees, costs and expenses to Class counsel, the approval or rejection of any claim filed by Class members, and the distribution of the proceeds of the Settlement in accordance with the Stipulation. Except for the disbursements made in accordance with this Court's Order awaiting attorneys' fees and reimbursement of expenses, no disbursements from the Settlement Fund shall be made except upon further Order of this Court.

Dated: September 8, 1993

STANLEY S. BROTMAN
United States District Judge

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth

In the case No. SJC-07263
and
SJC-07294

CHERYL ADAMS & others

vs.

CUMBERLAND FARMS, INC. & others
(and two consolidated cases)

pending in the Supreme Judicial Court for the county of Suffolk, Nos. SJ-96-0268 and SJ-96-0477

ORDERED, that the following entry be made in the docket; viz. —

Appeal dismissed.

By the Court,

/s/_____
Jean M. Kennett, Clerk

January 23, 1997